Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

CHARLES D. "CHARLEY" WILSON

Petitioner

vs.

JAMES G. HARLOW, JR., G.W. "BILL" SWISHER, JR., JOHN F. SNODGRASS, MARTHA A. GRIFFIN, JOHN A. TAYLOR, HERBERT W. CHAMPLIN, WILLIAM D. LITTLE, JR., F. DAIL HARPER, and HUGH L. HEMBREE, III

Respondents

On Petition for a Writ of Certiorari to
Supreme Court of the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an interlocutory appeal from a class certification order the Supreme Court of Oklahoma by order directed that briefs be limited to the issues presented by the class certification order. The respondents ignored the order and filed a 50 page brief only 7 pages of which were devoted to the class certification issues. The other 43 pages addressed jurisdictional issues previously decided adversely to respondents. In keeping with the court's order, petitioner did not brief the jurisdictional issues. Without extending petitioner notice or an opportunity to be heard on the jurisdictional issues the court decided the case on the briefs and adopted the brief and argument of the respondents on the jurisdictional issues and decided the case adversely to petitioner.

The question presented is:

Did the described internal procedure utilized by the Supreme Court of Oklahoma deprive petitioner of procedural Due Process of Law under the Fourteenth Amendment to the Constitiution of the United States?

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PETITION FOR WRIT OF CERTIORARI

Charles D. "Charley" Wilson petitions this court for a writ of certiorari to review the judgment of the Supreme Court of Oklahoma in this case.

OPINION BELOW

The not yet reported opinion of the Supreme Court of Oklahoma (App. *infra,* 1a-15a) is set forth in full in the Appendix.

JURISDICTION

The opinion and judgment of the Supreme Court of Oklahoma was entered on July 13, 1993. Petitioner's timely petition for rehearing was denied October 5, 1993. This court's jurisdiction rests on 28 U.S.C.)(1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

No State shall ****** deprive any person of ****** property without due process of law ******

U.S. Const. Amend. XIV.

STATEMENT OF CASE

Oklahoma Gas & Electric Company is the largest public utility in the state of Oklahoma supplying electrical service to some 600,000 Oklahoma ratepayers within the state of Oklahoma and an appreciable number of users in western Arkansas. The respondents constitute the Board of Directors of OG&E at the times relevant in this lawsuit.

In late 1985, OG&E entered into a contract termed a Power Sales Agreement with AES wherein AES would construct a $500 million coal-fired cogeneration plant in LeFlore County, Oklahoma, and OG&E would accept the production from this plant.

Petitioner commenced this class action lawsuit in state district court in December, 1988, seeking money damages against the respondents for common law negligence arising from the discharge of the board's duties concerning the construction of the cogeneration plan.

From day one the issue in the lawsuit was that of subject matter jurisdiction of the state district court to entertain the lawsuit. On three separate occasions the jurisdictional questions were presented to the Supreme Court of Oklahoma during the ensuing years and on each occasion the petitioner prevailed. Finally, on the fourth time up, in an appeal from a class certification order, the respondents prevailed and the case was dismissed for want of subject matter jurisdiction. Petitioner's petition for rehearing was denied.

EVENTS GIVING RISE TO PETITIONER'S CLAIM

The issue on the petition for rehearing and the issue in this petition for writ of certiorari is whether the internal procedure of the Supreme

Court of Oklahoma leading up to the promulgation of its opinion in the case was such as to deprive petitioner of procedural due process of law.[1]

In order that this issue may be brought into focus it is necessary to look at events found outside the opinion for nowhere in the opinion are these events discussed. Facts and events outside the opinion which give rise to petitioner's claim are:

(a) On August 11, 1992, the respondents filed an interlocutory appeal from the trial court's class certification order. The papers effecting the appeal disclosed the respondents intended to raise previously decided issues going to the jurisdiction of the trial court to entertain the case. On the same day the respondents filed a motion for permission to file a 50 page brief.

(2) Immediately, on August 14, 1992, petitioner filed a response to the motion to enlarge brief. (App., *infra*, 22a). Petitioner pointed out in this response that much of what respondents intended to bring to the court in the interlocutory appeal had long since been presented to and passed on by the court many times.

At this point it is essential the tracking language between the last paragraph of petitioner's response and the subsequent order of the court concerning content of the briefs be noted.

The last paragraph of petitioner's response to motion to enlarge brief read: (App., *infra*, 23a).

> "The appellants may need more than a 30 page brief to say whatever they have to say about the class action certification issue in this appeal. However the court should inform appellants that their brief *should be limited* to the question of class action certification and

[1] The merits of the court's opinion are not in issue in this petition. We do note, however, footnote 6 of the opinion which discloses that failure to give notice to petitioner was not inadvertent or an oversight on the court's part. The footnote discloses that petitioner had "specifically declined" to address the issues in his answer brief. No place does the opinion mention that the number one reason that petitioner had failed to "address" the merits of the subject matter jurisdiction was because the court had ordered such not be done in its August 18, 1992, order.

that the court has no need or desire to plow the same ground over on issues already decided adversely to the appellants. *Emphasis supplied.*

Four days later, on August 18, 1992, the court directed the clerk to enter the following order: (App., *infra*, 25a)

"On written application and agreement of the parties, appellants are granted leave t (sic) file by August 31, 1992, brief in chief of 50 pages in length. Brief is to be *carefully limited* to issues before the court in this appeal. Appellee is granted leave to file his answer brief of comparable length." *Emphasis supplied.*

(4) Notwithstanding this specially tailored order going to the content of their brief, the respondents proceeded to file a 50 page brief, only 7 pages of which were devoted to the class action issues while the other 43 went to the jurisdictional questions.

(5) Included within his answer brief, petitioner filed a motion to strike respondents' brief for a willful violation of the court's order of August 18, 1992. (App., *infra*, 26a) In his answer brief, petitioner assigned the limitations placed on the briefs by the August 18, 1992, order as his number one reason for not briefing these questions. (App., *infra*, 27a).

(6) Thus the matter stood on briefs before the court. The only communication petitioner received from the court during the 11 months the appeal was before the court was dated October 16, 1992, and informed the parties that the Supreme Court was going to retain the case and not assign it out to a Court of Appeals. Petitioner received no notice whatever that the court was even considering modifying the August 18, 1992, prohibiting the briefing of the jurisdictional issues. Petitioner was not noticed or offered an opportunity to respond and brief the jurisdictional issues.

(7) On July 13, 1993, the Supreme Court of Oklahoma promulgated and issued the opinion herein. Petitioner's motion to strike respondents' brief (App., *infra*, 26a) was ignored and was not mentioned or ruled upon. The opinion makes no mention of the August 18, 1992, order

limiting the subject matter of the briefs. The opinion does disclose the court adopted virtually in toto the brief and argument of the respondents on the jurisdictional questions in dismissing the case.

STAGE AT WHICH FEDERAL QUESTION RAISED

Under the circumstances of this case the federal question involved in this petition did not arise or at least was not known to the petitioner until the opinion was promulgated on July 13, 1993. Upon receipt of a copy of the opinion, the petitioner filed a timely petition for rehearing wherein he requested the Supreme Court of Oklahoma to withdraw the opinion and render the opinion of no effect and void on the grounds that petitioner had been deprived of procedural due process of law under the Fourteenth Amendment. (App., *infra,* 16a-20a).

As previously stated the court denied the petition for rehearing without comment. (App., *infra,* 21a).

REASON FOR GRANTING THE PETITION

The internal procedure utilized by the Supreme Court of Oklahoma leading to the promulgation of the opinion and the refusal of that court to grant a rehearing and withdraw the opinion after the constitutional infirmity was pointed out to the court through the petition for rehearing postured the court in the position of deciding a federal question that conflicts with the applicable decisions of the Supreme Court of the United States.

ARGUMENT

The Supreme Court of Oklahoma is bound by the procedural requirements of the Due Process of Law Clause of the Fourteenth Amendment. *United States v Raines,* 362 US 17, 14 L Ed2 524, 80 S Ct 519 (1960). Petitioner's cause of action is a property interest that is entitled to the protection of the Due Process Clause of the Fourteenth Amendment. *Mullane v Central Hanover Bank & Trust,* 399 US 306, 94 L Ed 384, 70 S Ct 652 (1950); *Tulsa Collection Service v Pope,* 485 US 478, 99 L Ed2 565, 108 S Ct 1340 (1988). The lack of due process of

law leading to the promulgation of the opinion requires that the opinion be completely withdrawn and voided and the *slate wiped absolutely clean* restoring petitioner to the position he occupied had due process been afforded him in the first place. *Armstrong v Manzo,* 380 US 545, 14 L Ed2 62, 85 S Ct 1178 (1965); *Peralta v Heights Medical Center, Inc.,* 485 US 80, 99 L Ed2 75, 108 S Ct 896 (1988).

Whatever the outer limits of the Due Process of Law Clause of the Fourteenth Amendment one central core component that remains absolutely constant is that notice and opportunity to be heard appropriate to the nature of the case must be provided. The case that is repeatedly cited by this court dealing with notice and an opportunity to be heard is *Mullane v Central Hanover Bank & Trust,* supra, where this court said:

> "many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

The "nature of the case" herein is a Two Billion Dollar lawsuit brought against the Board of Directors of a public utility for common law negligence. The critical question of law related to the jurisdiction of the district court to entertain the lawsuit. If one pauses and thinks about it, what happened here is truly bizarre. The Supreme Court of Oklahoma, aware that the critical questions of law going to jurisdiction were determinative of the case, proceeded to promulgate its opinion by deciding the questions of law in favor of the respondents and against the petitioner without extending to petitioner any notice or opportunity to present his side of the law.

The court was aware that the petitioner, in keeping with the court's order, had not briefed these issues. At some point, while the court had the case under consideration, procedural due process of law dictated that petitioner be given notice and an opportunity to be heard on the jurisdictional issues as set forth in the brief of the respondents. The failure of the court to do so cannot be designated as of no consequence. In the three previous occasions when the identical issues had been presented in the identical language and briefed by both sides (save for PURPA which

had only been up two times) petitioner had prevailed each time by a substantial majority vote of the court.

Procedural due process mandated some action by the court modifying its previous order of August 18, 1993, thus authorizing petitioner to brief the jurisdictional issues. A two line order and a 29¢ stamp would have bestowed on petitioner due process of law in this case. Neither was forthcoming. The Supreme Court of Oklahoma clearly had a major lapse in internal procedure with disastrous consequences to the petitioner and deprived him and 600,000 ratepayers of due process of law. The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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